THE PRESENT STATUS OF THE NORTHERN SECURITIES DECISION.

The case of the *Northern Securities Company* vs. *United States*,[1] decided on March 14, 1904, presented to the Supreme Court an instance of mere unification in a single corporate control of two parallel and competing lines of railroad doing inter-state business, without any positive act of restraint of competition in that business. A majority of the court decided that the combination or arrangement, by which the company had been organized, and control secured to it over both railroads through purchase of the majority of the stock of the two railroad companies in exchange for stock of the Northern Securities Company, was a violation of the Sherman Anti-Trust Act.[2] The decision was generally interpreted by the Bar and the business community as asserting the general principle, that the unification in a single hand of control over two or more active agencies of inter-state or foreign commerce[3] was, in itself, and without positive exercise of restraint upon the competition between the acquired agencies, a violation of that act; although it could be contended, upon strictly technical grounds, that the decision was to be restricted to the precise case before the court, and did not settle this broad principle; and such contention would have been somewhat supported by remarks of Mr. Justice Harlan and Mr. Justice Brewer in the majority opinions. But any doubt as to the scope of the decision in this respect seems to be resolved in favor of the broader view by two decisions of the United States Supreme Court, both unanimous, in which the principle determined by the *Northern Securities Case* is clearly indicated.

One of these decisions was rendered in the case of *Harriman* v. *Northern Securities Company*,[4] which was a suit growing out of the plan proposed by the directors of that company for the distribution of the stock of the acquired railroad companies after the rendering the decision in the *Northern Securities Case*. The opinion was delivered by the Chief Justice, who, in referring to a certain contention on behalf of Mr. Harriman, as to the nature

[1] 193 U. S. 197. [2] 26 Stat. L. 209, Ch. 647.

[3] By "active agencies of inter-state or foreign commerce," I intend such business or activities, like transportation from State to State, as in themselves constitute such commerce; in distinction from such business or activities, like manufacturing, which in themselves do not constitute it.

[4] 197 U. S. 244, decided March 6, 1905.

of the tenure by which the Northern Securities Company held the stocks of the two railroad companies, interpreted the *Northern Securities Case* as determining that the possession of power, which, if it were exercised, would prevent competition, was in itself obnoxious to the Sherman Anti-Trust Act, the Chief Justice saying:

"For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.

"Some of our number thought that, as the Securities Company owned the stock, the relief sought could not be granted; but the conclusion was that the possession of the power which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was."

The other case [5] came before the United States Supreme Court on writ of error to review a judgment of a Texas Court, forfeiting the license of a foreign corporation to do business in that State, because of violation of the anti-trust laws of the State. The suit had particular relation to the laws of the State of Texas. But in rendering the opinion for the unanimous Court, Mr. Justice McKenna took occasion to compare the principle underlying the State laws with that underlying the Sherman Anti-Trust Act, as construed in various decisions of the United States Supreme Court, including that in the *Northern Securities Case*. He pointed out that the conception of obnoxious monopoly had changed from the old-time notion of grant of exclusive privileges, and now included the power of controlling prices, as its most important element, saying:

"It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.' Its dominant thought now is, to quote another, 'the notion of exclusiveness or unity'; in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it has not only expres-

[5] National Cotton Oil Co. *vs.* Texas, 197 U. S., 115, decided Feb. 27, 1905.

sion in the Texas statutes; it has expression in the statutes of other States and in a well-known national enactment. According to them, competition not combination should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interests, and the power such unification gives. And that legislatures may so ordain this Court has decided."

The remarks above quoted were, indeed, not express decisions upon any point before the court in the respective cases; they are technically *obiter dicta* merely. But the views of the Justices as to the correct interpretion of the decision in the *Northern Securities Case* are so plainly indicated by them, that it is probable the court will adhere to that interpretation whenever another suit requires it to declare what was decided in the *Northern Securities Case.*

The operation of the Sherman Anti-Trust Act is not limited to transportation. In fact the Act makes no express reference thereto, but is, in broad general terms, directed against all restraint of trade or commerce among the several States or with foreign nations. Nor does the Act make particular reference to corporations; it is directed against monopolies, contracts, combinations and conspiracies in restraint of interstate or foreign commerce, by whatever agency, corporate or other, the restraint and monopoly may be effected. Therefore, the rule of the *Northern Securities Case,* interpreted by the subsequent decisions above referred to, is, that the unification in a single hand, corporate or other, of control over two or more competitive active agencies of interstate or foreign commerce is a violation of the Act. No other conclusion is logically deducible from that decision. The minority Justices in that case insist this conclusion necessarily follows from the majority position, and it lays a legal foundation for interference by the general government with business to an extent vastly beyond what was considered possible before the *Northern Securities Case* was decided. Doubtless, however, the Supreme Court will shrink from the practical application of this logical deduction; in the face of its own decisions it will probably contrive to justify the ironical comment of Mr. Justice Holmes,[6] that somehow or other the statute meant to strike at great combinations, while viewing the little ones with indifference. Doubtless the Court will find some way to leave little combinations by weak natural persons, in restraint, and even in monopoly, of their little inter-state trade undisturbed, while invoking the terrors of the Act

[6] p. 407.

upon the great corporations which enter into powerful combinations to restrain their great inter-state trade. But it is significant, that the court should be committed to a principle, which justifies interference by the general government with a great variety of affairs heretofore considered within the exclusive control of the States.[7]

The importance of the principle that unification of control over the several agencies of inter-state and foreign commerce is obnoxious to the Act is increased when it is combined with other principles previously settled, and it appears now to be the law, that

(1) Any restraint upon inter-state trade and commerce, whether reasonable or not, is obnoxious to the Act.[8]

(2) Any degree of monopoly in such trade or commerce, whether complete or not, is obnoxious to the Act.[9]

(3) The mere unification in a single ownership of control over several active competing agencies of such trade and commerce, of itself, and without any positive act of restraint upon competition, is obnoxious to the Act.[10]

When these principles are applied to business, little room is left for that initiative which was once the boast of the American. They tightly fetter the development of modern trade; whether wisely or unwisely is not here the question. Attention is directed only to the contrast between these principles and the freer conditions under which the United States grew. To the thoughtful student of American history, therefore, the decision in the *Northern Securities Case* seems to be the judicial declaration of a great change in the environment of American democracy. It seems to be the definite announcement that the period of development of

[7] The doctrine that the mere unification in a single concern of control over two or more competing agencies of trade is obnoxious to public policy was, of course, not novel in American decisions (Distilling and Cattle Feeding Co. *v.* People, 156 Ill. 448, 491; Harding *v.* American Glucose Co., 182 Ill. 618; State *v.* Portland Nat. Gas Co., 153 Ind. 489). But the assertion of a similar principle by the United States Supreme Court, as a ground of interference by Congress with the ownership of such agencies, although created by a State, was new and startling.

[8] U. S. *v.* Trans-Missouri Freight Association (1896), 166 U. S. 290; U. S. *v.* Joint Freight Traffic Association (1898), 171 U. S. 505.

[9] Addystone Pipe & Steel Co. *v.* U. S. (1899), 175 U. S. 211, 245; Northern Securities Co. *v.* U. S. (1904), 193 U. S. 197, 332.

[10] Northern Securities Co. *v.* U. S. (1904), 193 U. S. 197, as interpreted by Harriman *v.* Northern Securities Co. (1905), 197 U. S. 244, and National Cotton Oil Co. *v.* Texas (1905), 197 U. S. 115.

a new land, during which the freest exercise of individual sagacity was needed and applauded, is over; that in its stead has come the period of conservation, of crowded competition between individuals upon a land already so occupied, that there is no longer room for the large exercise of individual powers; that the capacities of an individual are no longer to be measured by their results upon the development of the land, but by the obstacles they seem to oppose to the well being of other men also in the land. According to most political philosophy, the earlier condition was that in which democracy might thrive, the latter that in which it has never yet existed long. And the political student might regard this decision as evidence of a fight for life between a democratic people, and the conditions its free democracy has generated in a new land. That the conflict between the democratic commonwealth and the so-called trust is considered serious by many is certain, and the events of the last few years indicate that the measures proposed by the opponents of combinations will put a severe strain upon the Federal Constitution in its present form. That Constitution was drafted one hundred and twenty years ago by, and for, a sparse agricultural population occupying great areas of land. It was formulated before the steam engine had been applied to transportation or manufacture, and before great enterprises in manufacturing or transportation were known. It is now applied to governing a nation of eighty-four millions of people, largely occupied in pursuits of manufacturing and transportation of great magnitude and complication, and it is about these pursuits, unknown when the Constitution was drafted, that the conflict over combinations is chiefly waged. It is not strange that the literal text of a document drawn up when conditions of life were so different from what they now are does not furnish a satisfactory guide to the solution of every present question. It would be a political miracle if it did. And so we find, upon the one hand, the foremost leader of popular sentiment against so-called trusts advocating legislation which violates the principles of constitutional interpretation established in the past, and, on the other hand, an opposition which seems to be going complacently about to squeeze the grown man into the boy's jacket, without a thought that the jacket may be split. The Constitution provides for its own amendment when changed circumstances require. But neither party to the anti-trust movement thus far makes any definite proposal for amendment. And yet it is becoming continually plainer, that,

unless the Constitution is amended, it will be strained by arbitrary interpretation out of all semblance to the original meaning of its text, or will be thrown aside as not sufficient to the nation's needs. For the test of a constitution, as of all political institutions, is, as Carlyle pointed out, how it wears, not what may have been the great ideas under the influence of which it was framed. Government is not an abstraction, nor a subject merely of subtle legal distinctions, but a living organism. If it does not satisfy the needs of its community, it will cease to live. A constitution is made for its people, not a people for their constitution; and if the time ever comes when the choice must be between deep-seated needs or deep-seated desires of a democratic people and their constitution, then the needs or desires will be satisfied and the constitution displaced. For the living will not be thwarted by the dead. I write advisedly, "deep-seated needs or deep-seated desires of a democratic people," for, in a democracy, the effects upon the framework of a government of deep-seated popular needs, or of deep-seated popular desires, are not distinguishable from each other. In the United States, at the present time, there is unmistakable fear that great combinations of trade are inimical to its democracy; and this is a fear expressed not only by the ignorant and the poor, but by many learned and well-to-do, who value the traditions of the fathers, and devoutly hope and believe that there is still vitality in American ideals. It is not the question here, whether those fears are well founded or not, nor whether those ideals have any basis in human nature or not. I only note that the fears and hopes exist. They are strong; they go deep down into the life of the American democracy. And the time has come, when it seems to many impossible to avert the disaster which they fear is threatened to that democracy, or to preserve those ideals, within the present framework of the Federal Constitution. It is a sober, influential, and growing opinion, that, whereas, in the past, the Federal Constitution sheltered and fostered that democracy, its limitations derived from a former generation now shelter and foster evils which endanger that democracy, so that a choice may be forced between the preservation of the democracy, and of the Federal Constitution in its present form.

That Constitution was made for the American democracy; the American democracy was not made for the Constitution. The American people made that Constitution, and they can unmake it, either by the direct, honest method which the Constitution itself

provides, or by the indirect, less honest method of construction and interpretation, which preserves its name, but destroys its meaning and spirit. The time seems to have come, when the one or the other process of constitutional change is inevitable; when, if the Federal Constitution is to remain a real force in governing the American democracy, it must be amended to meet the demands of that democracy.

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